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Supreme Court, U.S.
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No. 97-556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SUNDSTRAND CORPORATION,

Petitioner,

v.

RONALD BLACKBURN and BARBARA BLACKBURN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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I.

RESPONDENTS' ARGUMENT, CONCERNING THE COMPLETENESS OF THE FACTUAL RECORD, IS A RED HERRING.

Respondents correctly state that the precise language of the Sundstrand benefit plan's subrogation clause is not in the record on appeal. However, this circumstance is a red herring which should not affect this Court's decision because the plan's language is completely immaterial to the legal question presented by the instant case.

Until Judge Easterbrook issued his erroneous decision, Respondents framed the issue in this case as a pure legal question of ERISA preemption. They never thought, for one moment, that there was any issue of plan interpretation in the case or any need to parse the terms of Sundstrand's plan. That is why they did not put the language into the record. That is also why the Blackburns' state court Petition to Adjudicate Subrogation Claim (Brief in Opp., App. at 3a)[1] simply notes that Sundstrand has claimed subrogation rights under its plan and asserts that those rights are overcome by the Illinois common-fund doctrine which, they contend, is not preempted by ERISA. Thus, the District Court noted that "the facts are taken from the allegations in the petition to adjudicate" (Petition, App. at B2)[2] and observed

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[1] References to the Respondents' Brief in Opposition are cited as "Brief in Opp., ___."

[2] References to the Petition for Writ of Certiorari are cited as "Petition, ___."

that the Blackburns had not raised any issue of plan interpretation or identified any ambiguity in plan language (Petition, App. at B9-B10). Nor was any such issue raised on appeal to the Seventh Circuit.

The Blackburns' new argument plainly is based on Judge Easterbrook's *sua sponte* suggestion that the result of this case might be different if the plan language clearly and expressly purported to contradict the Illinois common-fund doctrine (Petition, App. at A7). This portion of the Seventh Circuit's opinion is illogical and unprecedented for several reasons. First, the Illinois common-fund doctrine is an equitable doctrine of general application, not a rule of interpretation or construction which applies to ambiguous or silent documents. *Scholtens v. Schneider*, 173 Ill.2d 375, 385-6, 671 N.E.2d 657, 663 (1996). Second, it is beyond peradventure that ERISA preemption disputes must be resolved as a matter of statutory construction and Congressional intent; no court ever has permitted a plan sponsor to control the outcome of a preemption question through artful plan drafting. Finally, Judge Easterbrook plainly had no evidentiary basis for his gratuitous observation that "Sundstrand's plan does not have . . . a requirement [for the participant to take full responsibility for the legal expenses of his tort action]" (Petition, App. at A7).

Contrary to the Blackburns' argument, this Court can and should resolve the important issue of ERISA preemption in this case on the existing record. This legal issue can be decided, as it was in the courts below, without reference to the specific terms of Sundstrand's plan.

II.

RESPONDENTS' ARGUMENT, THAT NO SPLIT EXISTS AMONG THE CIRCUITS BECAUSE THE CASES DECIDED IN OTHER CIRCUITS TURN ON DISTINGUISHABLE PLAN LANGUAGE, IS A SIMILAR RED HERRING.

For much the same reasons discussed above, this Court should reject Respondents' effort to distinguish the instant case from other Court of Appeals decisions on the ground that they involved unambiguous subrogation provisions (Brief in Opp., at 9). Those cases, like the instant case, involved straightforward, common subrogation clauses which provide the plan with the first dollars of any tort recovery, unreduced by the participant's attorney's fees. The objective of such plan provisions was enforced by the numerous Court of Appeals decisions cited in the Petition herein, a result dictated by this Court's holding in *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990). This Court's holding in *Holliday* and the objective of such straightforward subrogation language is manifestly frustrated by the common-fund doctrine and by the Seventh Circuit's conflicting decision below.

In short, the simple, unencumbered record in this case provides an ideal platform to provide legal guidance to the lower courts and practitioners on ERISA preemption and to correct the Seventh Circuit's erroneous understanding of this Court's recent decisions in the area.[3]

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[3] Respondents also suggest that this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct. 1671

(continued...)

Respectfully submitted,

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[3] (...continued)
(1995) stands for the proposition that state laws of general application can never be preempted by ERISA, even if they directly contradict the terms of a plan created under ERISA (Brief in Opp., at 10). This is precisely the type of misunderstanding of the preemption doctrine which this Court ought to correct.